Harabedian Paving Company *and* Operating Engineers' Local 324 Fringe Benefit Funds. Case 7–CA–35228

April 14, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

Upon a charge filed on November 17, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint on December 23, 1993, against Harabedian Paving Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On February 22, 1994, the Acting General Counsel filed a Motion for Default Summary Judgment with the Board. On February 25, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated January 24, 1994, notified the Respondent that unless an answer were received by February 7, 1994, a Motion for Default Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with its principal office and place of business in Troy, Michigan, has been engaged in the construction industry in providing paving subcontracting services for general contractors and real estate developers at various jobsites within the State of Michigan. During the 12-month period ending November 17, 1993, the Respondent, in conducting its business operations, provided within the State of Michigan subcontracting services valued in excess of $50,000 to Kirco Realty & Development, a general contractor and real estate developer which is incorporated in Michigan and has facilities located in Michigan. During the 12-month period ending November 17, 1993, Kirco Realty & Development had gross revenues in excess of $500,000 and purchased from points located outside the State of Michigan and caused to be transported directly to its Michigan facilities and jobsites products, goods, and materials valued in excess of $50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 324, International Union of Operating Engineers, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party, Operating Engineers' Local 324 Fringe Benefit Funds, is, and has been at all material times, the agent of the Union for purposes of collecting fringe benefit contributions. All full-time and regular part-time class I operators, class III operators, and working foremen employed by the Respondent at or out of its Troy facility; but excluding all office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

About October 23, 1963, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by entering into an agreement with the Union. Since about October 23, 1963, and at all material times, the Union has been and is, the limited exclusive collective-bargaining representative of the employees in the unit and has been recognized as such by the Respondent. Such recognition is derived from an agreement executed by the Respondent and the Union about October 23, 1963, and re-executed by the same parties about December 3, 1968, and renewing itself automatically thereafter, binding the Respondent to abide by the wage rates, fringe benefits, working rules and classifications of the most current collective-bargaining agreement (the contract), executed by the Union and the Michigan Road Builders Association. The most recent of these contracts is effective by its terms from June 8, 1992, until June 1, 1995. At all times since about October 23, 1963, based on Section 9(a) of the Act, the Union has

been the limited exclusive collective-bargaining representative of the unit.[1]

The contract obligates the Respondent to pay certain wages to unit employees and to make contributions on behalf of all unit employees for various fringe benefits, including:

(a) Health Care
(b) Pension
(c) Retiree Benefit
(d) Vacation
(e) Supplemental Vacation
(f) Apprentice
(g) Advancement Promotion
(h) Local 324 Labor Management

Commencing on or about May 17, 1993, and continuing to date, the Respondent has failed and refused to make contributions on behalf of all the unit employees for the various fringe benefits described above.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees (within the meaning of Section 8(d) of the Act),[2] and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions for various fringe benefits which are mandatory subjects of bargaining, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Harabedian Paving Company, Troy, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make fringe benefit contributions which are mandatory subjects of bargaining, as required by the collective-bargaining agreement with Local 324, International Union of Operating Engineers, AFL–CIO on behalf of the employees in the following unit:

> All full-time and regular part-time Class I operators, Class III operators, and working foremen employed by the Respondent at or out of its Troy facility; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contractually required fringe benefit contributions which are mandatory subjects of bargaining and which it has failed to make since May 17, 1993, on behalf of the unit employees, remit any other amounts due the Funds, and make the employees whole in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) Post at its facility in Troy, Michigan, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

[1] In the absence of any need to determine in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f), Member Browning would not reach that issue.

[2] The complaint does not affirmatively state that contributions to the various fringe benefit funds relate to wages, hours, or other terms and conditions of employment of the unit employees. Moreover, the record does not indicate whether the *advancement promotion* fringe benefit is an industry promotion fund and therefore a permissive subject of bargaining for which no remedy is warranted. *Finger Lakes Plumbing & Heating Co*., 254 NLRB 1399 (1981), and cases cited there. We leave resolution of this issue to the compliance stage at which time we will also allow the Respondent to raise this issue with regard to the other fringe benefit contributions.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to make contractually required fringe benefit contributions which are mandatory subjects of bargaining, as required by our collective-bargaining agreement with Local 324, International Union of Operating Engineers, AFL–CIO on behalf of the employees in the following unit:

> All full-time and regular part-time Class I operators, Class III operators, and working foremen employed by the Employer at or out of our Troy facility; but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contractually required fringe benefit contributions which are mandatory subjects of bargaining and which we have failed to make since May 17, 1993, on behalf of the unit employees, remit any other amounts due the Funds, and make our employees whole, with interest.

HARABEDIAN PAVING COMPANY